NUMBER 81-1397

SUPREME COURT
UNITED STATES OF AMERICA

OCTOBER TERM, 1981

STATE OF ALABAMA,
Petitioner,

VS.

JOHN RONALD DANIELS,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER NEW TRIALS ARE MANDATED IN ALL ALABAMA CAPITAL CASES BY Beck v. Alabama, 447 U.S. 625 (1980) AND Beck v. State, 396 So.d 645 (Alabama 1981).

II WHETHER THE EVIDENCE IN THIS CASE WOULD SUPPORT INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

TABLE OF AUTHORITIES

Section 13-11-2 (a) (10) of the Code of Alabama (1975). 8,9

Beck v. Alabama, 447 U.S. 625 (1980). 6,7,9

Beck v. State, 396 So.2d 645 (Ala 1981). 6,7

Chavers v. State, 361 So.2d 1106 (Ala. 1978). 8

Evans v. Britton, 628 F.2d 400 (1980), rehearing denied, 639 F.2d 221 (5th Cir. 1981), Cert. granted No.80-1714 6

Keller v. State, 380 So.2d 926 (Ala. Cr. App. 1979), cert. denied, 380 So.2d 938 (1980). 9

Reed v. State, 407 So.2d 162 (Ala. 1981). 6,7

STATEMENT OF THE CASE

Respondent adopts as substantially correct the Statement of the Case contained in the Brief for Petitioner, but would add the following to the State's summary of the facts:

The credibility of Melvin Turberville, who testified about a conversation with Respondent in the Mobile County Jail, came under sharp attack from the defense (R 308, 311-12, 323-26), and Turberville admitted to a prior inconsistent statement in which he said that John Ronald Daniels never told him he killed anyone. (R. 318-20)

SUMMARY OF ARGUMENT

I. NEW TRIALS ARE MANDATED IN ALL ALABAMA CAPITAL CASES BY Beck v. Alabama, 447 U.S. 625 (1980) AND Beck v. State, 396 So.2d 645 (Ala. 1981).

The unconstitutional choice between death and complete freedom renders the factfinding process so defective that a post-trial review cannot correct the error. The accuracy demanded in a decision to take a life can only be achieved by a fair trial. The bifurcated proceeding required by the Alabama Supreme Court makes a new trial even more nesessary.

II. THE EVIDENCE IN THIS CASE WOULD SUPPORT INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

Respondent's participation in the crime charged does not necessarily amount to capital murder. Not every accomplice to a capital crime can be found guilty of capital murder under Alabama law. Moreover, the evidence leaves a jury question as to whether Respondent was an accomplice in both intentional killings.

I. NEW TRIALS ARE MANDATED IN ALL ALABAMA CAPITAL CASES BY Beck v. Alabama, 447 U.S. 625 (1980) AND Beck v. State, 396 So.2d 645 (Ala. 1981).

In Beck v. Alabama, this Court decided that the death penalty may not be imposed where a jury could not consider lesser included offenses which were supported by the evidence. 447 U.S. 625, 627 (1980). After remand, the Alabama Supreme Court decided that in light of this Court's decision, the Alabama statute required a bifurcated proceeding to insure that the jury would not use its power to decide guilt to make a de facto punishment decision. Beck v. State, 396 So.2d 645, 659-63 (Ala. (1981). Subsequently, retrials were mandated for all Alabama capital cases. Reed v. State, 407 So.2d 162 (Ala. 1981).

The Alabama Supreme Court's interpretation of Beck v. Alabama is correct, because no ex post facto examination of a record can liberate a trial from the terrible effects of the Hobson's choice between death and complete freedom for a defendant. All of a defendant's decisions on the preparation and conduct of his trial had to be weighed in light of the heavy burden of this unconstitutional choice. The punishment for a capital crime is too severe and too final to be imposed on the basis of speculation about what a defendant would or would not be able to achieve if he were given a fair trial. Evans v. Britton, 628 F.2d 400, 401 (1980), rehearing denied, 639 F.2d 221 (5th Cir. 1981), cert. granted No. 80-1714. The decision to take a person's life is one that should be made only with highest possible degree of accuracy. That accuracy cannot be achieved in a post-trial hearing, Beck v. Alabama at 645-46, but only in a new trial.

A new trial is given even more importance by the Alabama Supreme Court's decision that henceforth the jury's factfinding and

sentencing functions will be bifurcated. This procedure was required by the role in sentencing given to the jury under the Alabama Statute. Beck v. State at 659-60. The separation of the jury's two functions will work significant changes in both the content and emphasis of the factfinding process. See Beck v. Alabama at 643 n.19. The requirement of a bifurcated proceeding and its consequent effects make a new trial a necessity. Reed v. State, 407 So.2d 162, 163 (Ala. 1981).

II. THE EVIDENCE IN THIS CASE WOULD SUPPORT INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

The Alabama rule on whether charges on lesser included offenses should be given was stated in Chavers v. State, 361 So.2d 1106, 1107 (Ala. 1978):

> ... our decisions are to the effect that every accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however weak, insufficient, or doubtful in credibility.

The evidence shows that on January 2, 1977, two people were shot to death on Interstate 10 in Mobile County. (R.286-87, 380) Respondent was charged with "Murder in the First Degree wherein two or more human beings are intentionally killed by the Defendant by one or a series of acts." Section 13-11-2 (a) (10) of the Code of Alabama (1975). The State's theory was that Respondent and his Co-Defendant, Philip Wayne Tomlin, both participated in the killings. (Br. for Petitioner 3-4,6) There was no evidence presented as to who fired the fatal shots, or under what circumstances the shots were fired. The defense was alibi. (R. 685-87)

The State argues in its brief that the only two choices for the jury were a verdict of guilty of capital murder or a verdict of not guilty. "Either the Respondent participated in the killings of the two victims in Mobile, Alabama, or the Respondent was in Texas." (Br. for Petitioner 15) But if the jury believed the Respondent participated, that does not lead ineluctably to the conclusion that his participation amounted to capital murder.

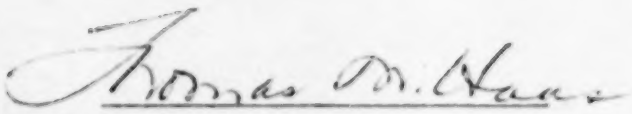
Alabama recognizes that an accomplice to a capital crime may be convicted of capital murder. Ritter v. State, 375

So.2d 270, 274-75 (Ala. 1979). The Supreme Court of Alabama found that "Ritter stands at the most culpable end of the spectrum of accomplice liability," but stated that the death penalty would not be permissible for all accomplices to capital crimes. 375 So.2d at 275; see also Beck v. Alabama, 447 U.S. 625, 628 n.2 (1980). Since there is no direct evidence of the degree or character of this Respondent's participation, his position along the spectrum of accomplice liability is something a jury must decide.

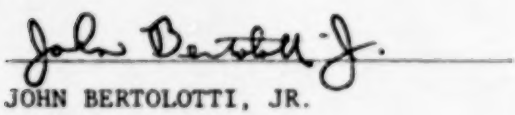
Furthermore, the State has the burden proving, under Section 13-11-2 (a) (10), that the Respondent was an accomplice to the intentional killing of both victims. If it could be shown that Respondent was an accomplice to one of the killings, it would still be necessary to prove that he also had a specific intent with respect to the other victim. In Alabama, an accomplice to murder must have "a previous understanding to kill or injure the deceased, or ... a knowledge of the intent to kill on the part of the co-defendant." Keller v. State, 380 So.2d 926, 934 (Ala. Cr. App. 1979), cert. denied, 380 So.2d 938 (1980). The inference to be drawn from the evidence as to Respondent's intent can only be drawn by a properly instructed jury.

CONCLUSION

Respondent respectfully asks this Court to deny certiorari in this case.



THOMAS M. HAAS



JOHN BERTOLOTTI, JR.

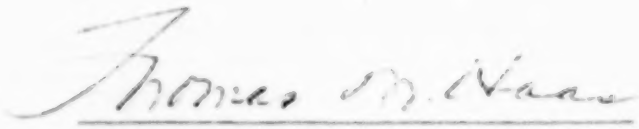
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Thomas M. Haas, a member of the Bar of the United States Supreme Court, do hereby certify that I have this day served a copy of the foregoing brief on the Attorney General of the State of Alabama, by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

Honorable Charles Graddick
Attorney General of Alabama
64 North Union Street
Montgomery, Alabama 36130

April 9, 1982.



THOMAS M. HAAS

CERTIFICATE OF MAILING

I, Thomas M. Haas, a member of the Bar of the United States Supreme Court, hereby certify that the foregoing notice, motion and brief in Case No. 81-1397 were mailed to the Clerk of the Supreme Court of the United States by placing them in the mail at the United States Post Office at Congress and Saint Joseph Streets in Mobile, Alabama during regular business hours on April 9, 1982.

Thomas M. Haas

THOMAS M. HAAS

Sworn and subscribed before me this 9th day of April, 1982.

Glenda Thompson

GLENDA THOMPSON
Notary Public
My Commission expires: 1/24/84

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SUPREME COURT, U.S.

NUMBER 81-1397

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Respondent moves for leave to file his brief in opposition to certiorari under the provisions of rules 46 and 39, and as grounds assigns the following:

1. Respondent is presently incarcerated in the Alabama State Penitentiary, and has been continuously in custody since early in 1977.

2. Respondent was represented by his retained Attorney, Thomas M. Haas, in the trial court and in the Appellate courts of Alabama. Respondent has not been able to pay his Attorney for the proceedings in this Court, and cannot afford the costs of printing and binding briefs.

3. Respondent has executed a Pauperis affidavit which is being mailed under separate cover from Holman Prison, Alabama.

WHEREFOR, Respondent moves this Court to allow him to proceed In Forma Pauperis.

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STATE OF ALABAMA
Petitioner,

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JOHN RONALD DANIELS,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, John Ronald Daniels, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. LAST EMP. 12-20-76 $2,000 MO.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes,state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

John Ronald Daniels

JOHN RONALD DANIELS

CERTIFICATE OF SERVICE

I, Thomas M. Haas, a member of the Bar of the United States Supreme Court, do hereby certify that I have this day served a copy of the foregoing notice and motion on the Attorney General of the State of Alabama, by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

Honorable Charles Graddick
Attorney General of Alabama
64 North Union Street
Montgomery, Alabama 36130

April 9, 1982.

Thomas M. Haas

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